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Commentary on James B. Freeman: “Resolving Moral Dissensus: Possibilities for Argumentation”

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Freeman’s two discussants, John and Jim, are engaged in a disagreement about the permissibility or impermissibility of certain sexual acts. John has taken the “anything goes” position—“What people do between the sheets is their own business.” Jim is attacking John’s position, and Freeman’s examples show the nature of this attack: Jim should present what Freeman calls “interpretive properties” capable of expression in a Toulmin warrant form that support the impermissibility of certain sexual acts. Freeman’s two examples of such properties are: (1) performing sex completely divorced from procreation; and (2) performing sex in which one, or both, of the sexual partners feels degraded. Freeman now allows John only two forms of rebuttal. John could first ask Jim to justify the warrants. Second, John could grant the *prima facie* acceptability of the impermissibility warrants, but claim that there is some further “deontically relevant property” (Freeman, p. 3) that overturns Jim’s warrants. Freeman notes that John takes on a “very significant burden of proof” in making this rebuttal. Jim’s answer to John can avoid taking on a similar burden of proof provided that Jim “can construct a scenario into which both he and John can enter empathetically” (Freeman, p. 3) and for which there is some relevant property *Xi* which both Jim and John agree outweighs any other permissibility-relevant property.

Freeman describes the moral dissensus between John and Jim as a matter of divergence “over the properties which they see as relevant to evaluations....” (p. 3) He lays out a formula to clarify symbolically how the dissensus goes: roughly, two persons may differ with respect to an action’s right-making properties and wrong-making properties as well as with respect to which set of properties outweighs the other. Consistently, Freeman expresses a strong endorsement and acceptance of W. D. Ross’s theory of ethical intuitionism. Following Ross, Freeman views dissensus as a matter of differing perceptions of an act’s weighted properties, and resolution of dissensus as a matter of reconciliation of the contrasting property perceptions. In sum, moral judgment is fundamentally a matter of property perception.

My initial concern is that Freeman’s analysis, with its strong emphasis on the properties of actions, does not do justice to quite ordinary cases of moral dissensus. Moreover, his reconstruction of Toulmin warrants does not permit at least one important type of warrant Toulmin himself might acknowledge. To see this, consider an elaboration of Freeman’s John and Jim dialogue. According to Freeman, Jim should construct a variety of scenarios in which relevant properties tend to show (*prima facie*) the

impermissibility of a certain sexual act. Suppose, in addition to Freeman's two examples, Jim also advances the possibility that the act may involve verbal insults and severe psychological abuse, or that the act may involve physical harm and injury to one of the partners. That is, suppose Jim, following Freeman, puts forward a number of properties that give a *prima facie* warrant for the impermissibility of the act. Freeman, as noted above, allows John only two responses: challenge Jim's warrants for the Toulmin principles advanced or propose some other relevant property of the act that is overriding. John, however, could respond in a manner quite outside these two forms of rebuttal. John might say, "Look, I agree with you that if the action involves these things—degradation, insults, abuse, or physical injury—then it is wrong and should not be permitted. However, what does that have to do with it being a sexual act? If I were playing golf and my golf partner began insulting my putting ability, verbally abusing my swing, and even hitting me with his clubs, then that would be wrong, too, but not because it is an immoral *golfing* action!" Note well that John *agrees* with Jim's assessment of the various actions—both judge them impermissible. Nor does John disagree with Jim on any of the relevant deontic properties, either in terms of what they are, whether they are relevant, or what the balance of wrongness over rightness is. Nevertheless, John believes that his standpoint on sexuality has not been addressed, and the main disagreement still holds.

In this elaboration, John might well be appealing tacitly to general principles—a common move in cases of moral dissensus. John might be thinking of something like John Stuart Mill's 'harm principle' as a 'liberty limiting principle'—that is, the only justification for making actions impermissible is when those actions harm or threaten harm to others. H. L. A. Hart accepts Mill's harm principle, but is willing to include a legal paternalism principle wherein sanctions may also be imposed on actions which harm or threaten to harm the agent himself or herself. Joel Feinberg not only accepts Mill's harm principle, but also wishes to endorse an offense principle in which sanctions may be imposed on actions that cause, or threaten to cause, profound offense to others. (See Richard Galvin's paper "Legal Moralism and the U. S. Supreme Court," presented at the 2006 Eastern American Philosophical Association AILACT group session and currently available on the AILACT website.) For these philosophers, the main moral concern is to maximize individual liberty, and actions are to be judged permissible as long as they do not violate the harm, or other, principles. In contrast to Freeman's account, John's response to Jim need not point to other moral properties of the action, or assign greater weight than Jim does to the possession of some property or other. Rather, John may be making a tacit appeal to a higher moral *principle* along the lines of Mill's harm principle. John may be taking the stance that it is not the sexual features or properties of the action that matter, it is only the question of whether or not harm is involved that matters. Lacking such harm to others (or harm to oneself in Hart's case, or causing profound offense to others in Feinberg's case), there is no justification for limiting individual sexual liberties. It strikes me that Toulmin would view John's appeal to such a principle as a paradigm example of appealing to a warrant; nevertheless, I don't see how Freeman can include it within his analysis. Toulmin may have argued against moral absolutism and the purely deductive nature of moral reasoning associated with it, but that does not mean Toulmin eschewed any appeal to general moral principles. Likewise, Toulmin may have valued a return to casuistry in order to discern the relevant moral features of an action, but doing so does not imply that Toulmin excluded the use of

principles in moral reasoning. It is hard to see how Freeman could accommodate these aspects of Toulmin's thought.

The recognition of the importance of both principles and facts in moral deliberation is found in John Rawls' notion of 'reflective equilibrium,' in which both general moral principles and accepted moral facts may play a role in moral decision-making. Rawls argues that moral facts we accept may lead us to revise our moral principles; likewise, moral principles we hold dear may cause us to reject various moral facts. The "reflective equilibrium" we sustain is holistic: coherence after due reflection on various considerations, including general principles and moral facts, is sovereign. Thus, my present concern with Freeman's analysis is how he can make sense of what seems to be a brute fact, for Rawls at least, about moral deliberations, including cases of dissensus: the common appeal to both moral facts and general moral principles.

Perhaps this is unfair to Freeman. He does describe the Toulmin warrants expressing interpretive properties as "principles," capable of expression as "universally generalized subjunctive conditional statements." Are these principles enough to counter my worries about his analysis not permitting the introduction of moral principles? I submit that they are not. Freeman's warrants or principles are obtained by a routine translation process based on specific wrong-making properties. The "universal principles" thus obtained will all have the form: "If an action has property Xi, then it is impermissible." Moreover, the properties Xi are all 'deontically relevant properties,' but are not moral properties *per se*. Freeman could argue that this captures Mill's harm principle, which could be cast in what looks like the same form: "If an action causes harm to others, then it is impermissible." But that misses the point of Mill's view: harm is the *only* liberty limiting principle, and is justified *as the only one* by further appeal to the principle of utility. Both principles occur within a systematic moral theory and are quite different in scope and theoretic depth from Freeman's property-based principles. Similarly, Kant's categorical imperative, in contrast to Freeman's model, does not target specific moral properties or features of an action at all; thus, it is hard to see how Freeman could allow an appeal to anything like the categorical imperative in his analysis. Nor does anything Freeman develops later in his paper permit the introduction of the sort of general moral principle John Rawls countenances in moral deliberations. Freeman introduces Rescher's complex schemata for expressing assertions and counterassertions with presumptive force. His analysis, however, still focuses on the possession of right-making and wrong-making properties and the claimed balance between them. Later, Freeman introduces complex schemata of his own, inspired by Govier's diagramming techniques, but Freeman's emphasis remains on the properties or features of the action or situation upon which the moral properties supervene. In fact, throughout his paper, Freeman is quite consistent. In his later discussions of acquired perceptions and their relation to interpretive principles and different types of warrant backing, Freeman maintains the centrality of his model of moral dissensus:

Why might proponent and challenger not reach consensus? Given their arguments, they still could disagree over the acceptability of a premise or the reliability of a warrant, given its backing and potential rebuttals. But even more fundamentally, they may continue to disagree over whether the features positively relevant to the evaluative property ascribed outweigh the negative features, or whether the negative features outweigh the positive. (Freeman, p. 17)

Freeman's giving dominance to property or feature perception, to the exclusion of any consideration of general principles, worries me most, for it raises doubts about the general applicability of Freeman's analysis to instances of moral deliberation and dissensus.

I have a further concern about Freeman's use of supervenience. What John's golf counterexample also shows is that specifying what the "relevant" right-making or wrong-making characteristics of an action are cannot be a simple matter: no simple laundry list of all the features of an action will do. That an action may be sexual in part may have no bearing on what the act's properties are upon which the evaluative properties supervene. Only some of the features of any action may be the ones supporting the supervenience relation, with many of the action's properties being irrelevant or coincidental. However, that creates the major problem of deciding which are relevant. Appealing to supervenience is a popular move in a number of philosophical contexts, but placed under scrutiny, it may not have the explanatory power so often touted. In the present instance, it is not clear whether Freeman is using supervenience to indicate some kind of metaphysical necessity, logical necessity, or merely nomological necessity between the deontically-relevant characteristics and the overall rightness and wrongness of the action. Also, is Freeman expressing ontological commitments with respect to the existence of rightness and wrongness as metaphysically independent properties? In any case, John's response calls in question exactly which properties truly supervene on which. Is the action best described as a sexual action *simpliciter* or is it a degrading, insulting, abusive, or injurious action that is also, coincidentally, a sexual action or a golf-playing action? So, adding the notion of supervenience to Ross's moral-properties-in-balance analysis may be an unnecessary and unhelpful complication.

One last worry is how analogical moral reasoning might fit with Freeman's model, but perhaps that is best left for later discussion.

W. D. Ross has given moral philosophers the valuable notion of a *prima facie* duty, especially important when considering cases of moral conflict or dissensus. Freeman deserves much credit for having developed that notion further, tying it to the idea of a Toulmin warrant--even extending it to Rescher's presumption schemata. In addition, Freeman provides us with an innovative argument-diagramming procedure able to clarify the nature of the moral dissensus at hand, perhaps even aiding in the resolution of a disagreement. Also, Freeman's discussion of acquired perceptual beliefs and how they are given presumptive status, especially in cases of cross-cultural dissensus, is intriguing. In short, there is much of value in Freeman's paper. My main concern is that, in embracing Ross's ethical theory so firmly in all its points, especially in its supervenience property-based model, Freeman has prevented these important ideas from having the free play they deserve in clarifying the nature of moral reasoning and moral dissensus.

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